IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

OP.No. 512 of 1999(J)

PETITIONER:

M/S.CARDAMOM MARKETING CORPORATION,
VANDANMEDU, IDUKKI DISTRICT REPRESENTED
BY THE MANAGING PARTNER S. VADAMALAIMUTHU.

BY ADV. SRI.C.K.THANU PILLAI

RESPONDENTS:
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1. **THE STATE OF KERALA, REPRESENTED BY**
   THE CHIEF SECRETARY TO GOVERNMENT,
   SECRETARIATE, THIRUVANANTHAPURAM.

2. **THE DEPUTY COMMISSIONER,**
   COMMERCIAL TAXES,S KATTAPPANA,
   IDUKKI DISTRICT.

3. **THE INSPECTING ASSISTANT COMMISSIONER,**
   COMMERCIAL TAXES, KUMILI,
   IDUKKI DISTRICT.

4. **THE DEPUTY TAHSILDAR, REVENUE RECOVERY,**
   NEDUMKANDAM.

BY GOVERNMENT PLEADER SRI.C.K.GOVINDAN.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 20/02/2007, THE COURT ON 14/03/2007 DELIVERED THE FOLLOWING:

O.P NO. 512 OF 1999

ORDER IN C.M.P.NO. 855 OF 1999 IN OP NO.512 OF 1999

14/03/2007 **SD/-**
ANTONY DOMINIC, JUDGE

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: **TRUE COPY OF THE ASSESSMENT ORDER DATED 29.7.1997 AND STATEMENT SHOWING THE DETAILS OF THE RETURN IN FORM II.**

EXT.P2: **TRUE COPY OF THE ASSESSMENT ORDER DATED 21.7.97 AND STATEMENT SHOWING THE DETAILS OF RETURNS IN FORM NO.9.**

EXT.P3: **TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 85-86 DATED 24.12.91.**

EXT.P4: **TRUE COPY OF THE LETTER DATED 15.4.1992.**

EXT.P5: **TRUE COPY OF THE LETTER DATED 8.5.1992.**

EXT.P6: **TRUE COPY OF THE NOTICE ISSUED BY THE 3RD RESPONDENT DATED 30.8.1994.**

EXT.P7: **TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER DATED 6.9.1994.**

EXT.P8: **TRUE COPY OF THE ORDER LEVYING INTEREST DATED 15.5.1996.**

EXT.P9: **TRUE COPY OF THE REVISION APPLICATION FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.**

EXT.P10: **TRUE COPY OF THE JUDGMENT IN OP NO.7214/97-H DATED 25.4.1997 PASSED BY THIS HON'BLE COURT.**

EXT.P11: **TRUE COPY OF THE ORDER DATED 5.11.1998 ISSUED BY THE 2ND RESPONDENT.**

EXT.P12: **TRUE COPY OF THE JUDGMENT IN O.P.NO.9284/1986 PASSED BY THIS HON'BLE COURT.**

EXT.P13: **TRUE COPY OF THE JUDGMENT IN OP NO.6869/1996 PASSED BY THIS HON'BLE COURT.**

EXT.P14: **TRUE COPY OF THE ARGUMENT NOTES DATED 23.9.1998 FILED BY THE COUNSEL FOR THE PETITIONER BEFORE THE 2ND RESPONDENT.**

EXT.P15: **TRUE COPY OF THE PROCEEDINGS OF THE INSPECTING ASSISTANT COMMISSIONER, DEVICOLAM DATED NIL.**

//TRUE COPY//

ANTONY DOMINIC, J.
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O.P NO. 512 OF 1999
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Dated this the 14th day of March, 2007

J U D G M E N T

1. Cardamom Marketing Corporation, the petitioner herein, is a Partnership firm carrying on the business of auction sale of Cardamom at Vandammedu in Idukki District is a registered dealer under the Central Sales Tax Act and Kerala General Sales Tax Act. Ext.P3 dated 24.12.1991 is the final assessment order of the petitioner for the assessment year 1985-86, issued by the 3rd respondent, in terms of which, the petitioner was entitled to refund of Rs.56,51,054.16 and Rs.3,78,805.94, being excess Sales Tax and Surcharge remitted during the assessment year. Although, by Ext.P3, Rs.60,29,860.10 was thus liable to be refunded to the petitioner, the 3rd respondent did not give effect to Ext.P3 by either refunding or adjusting the amount as required of him under Section 44 of the Kerala General Sales Tax Act 1963.

2. As a result of this, petitioner by Ext.P4 letter requested the 3rd respondent that in case if there is any delay in effecting refund orders may be passed for adjusting the refund amount against their future tax liability. It is stated that Ext.P4 and the subsequent letters written by the petitioner, were not responded by the assessing authority and finally by Ext.P5 letter, petitioner informed that for the month of April 1992 towards their liability under the Central Sales Tax Act Rs.8,76,282 was due and

requested the 3rd respondent to adjust their due against the excess amount refundable to them under Ext.P3. Even this request was not responded nor did the 3rd respondent object to the request. For the subsequent months till December 1992, petitioner continued to file their returns and simultaneously requesting to adjust the excess amount that was still remaining to be refunded.

3. It is stated that on 15.09.1993 the 2nd respondent issued notice under Section 35 of the Act proposing to re-open the assessment for the assessment year 1985-86 and the 3rd respondent thereafter objected to the adjustment of the amount liable to be refunded towards tax. Accordingly, the petitioner is stated to have remitted the entire amount of Rs.60,29,860.10 by cheque on 30.07.1994. Thereafter, by Ext.P6 notice, the 3rd respondent proposed to levy penal interest for the alleged belated payment of tax and surcharge and the petitioner by Ext.P7 filed his objections. The matter was considered by the 3rd respondent and by Ext.P8, referring to the judgment of this Court in O.P.No. 9284 of 1986 (Ext.P12), imposed penal interest of Rs.27,10,785/- for the alleged belated payment of tax from April 1992 to December 1992.

4. Aggrieved by Ext.P8, petitioner filed Ext.P9 revision before the 2nd respondent and as it failed to obtain an order of stay, O.P.No. 7214 of 1997 was filed before this Court, which was

disposed of by Ext.P10 directing consideration of Ext.P9 revision and stay was granted on the petitioner remitting Rs.7 lakhs before the Deputy Tahsildar (RR). It is stated that the 2nd respondent granted an opportunity of hearing to the petitioner and finally Ext.P11 order was passed dismissing the revision. In the aforesaid circumstances, this original petition has been filed seeking to quash Exts.P8 and P11 orders of the 3rd and 2nd respondents. Ext.P15 is an order passed by the Inspecting Assistant Commissioner, AIT & ST, Devikulam permitting adjustment in similar circumstances and the petitioner contends that he is entitled to similar treatment.

5. Apart from the counter affidavit filed by the Tahsildar (RR), Nedunkandam, which deals with the initiation of revenue recovery proceedings, none of the other respondents have filed any counter affidavit.

6. The counsel for the petitioner submitted that once refund has been ordered as per Ext.P3 final assessment order, the Assessing Authority is statutorily bound to refund the excess amount paid by the dealer. He also submits that the request made by the petitioner by Ext.P4 and the subsequent letters for adjustment of the amount already available with the 3rd respondent, was perfectly in terms of Section 44 (3) of the Act and that the 3rd respondent not only failed in discharging his duty under the statute, but also did not even respond to the repeated requests made by the petitioner. The counsel also

submits that being a creditor, the petitioner was entitled to exercise his rights and direct the debtor to adjust his dues towards his debts and this right under the Indian Contract Act also is in his favour. On the other hand, the Government Pleader would rely on Ext.P12 judgment of this Court and contend for the position that petitioner, an auctioneer, was only an agent of the growers and that even if the amount is to be refunded, the refund has to be made only to the growers. On this basis, it was contended that in the absence of any right to get refund, the petitioner could not have asked for adjustment of the amount ordered in Ext.P3.

7. Admittedly, the petitioner is the dealer who had remitted the amount which was ordered to be refunded in Ext.P3. Ext.P3 also discloses that the amount was to be refunded to none other than the petitioner itself, being the concerned dealer. Once it is accepted that the amount collected towards tax was liable to be refunded to the dealer, the petitioner herein, the 3rd respondent had the statutory duty to give effect to such refund and had no justification to retain the amount. He ought to have either refunded the amount or adjusted the same in terms of the provisions contained in Section 44 of the Act. It is against such statutory duty of the 3rd respondent that one has to appreciate the sustainability of the petitioner's request vide Ext.P4. In my view , when there was failure on the part of the 3rd respondent in refunding the amount, the petitioner was perfectly justified in requesting him to atleast

adjust the excess amount towards its future liability. Facts disclose that Ext.P4 and the subsequent letters in this behalf were not even responded. It was only after the 2nd respondent proposed to reopen the assessment that Ext.P6 notice was issued by the 3rd respondent, on 30.08.1994. Here again, the petitioner proved its bonafides and remitted the amount, on 30.07.1994, when the 2nd respondent issued notice to re-open the assessment. Thus, the petitioner was, in my view, entitled to adjustment of the amounts due to it towards its future tax liability and there was no reason to have declined to accept its request.

8. This court had occasion to consider a similar situation in **Vijaya Oil Mills Vs. State of Kerala (45 STC 463)** where it has been held;

> "A payment need not necessarily be by giving cash or by issuing cheque it can be by adjustment also. If a creditor is in possession of money belonging to his debtor and it is available for appropriation towards any account, on adjustment of it at the instance of the debtor towards a particular debt due from him there is to that extent discharge of that debt. In such cases adjustments, operate as payments".

9. Thereafter, this court considered the applicability of the principles of Sections 59 and 60 of the Indian Contract Act 1872 and concluded that general principles of law to the extent that they are not specifically excluded are applicable to

any enactment. Again an identical facts situation arose in the case of ***Gandhisons Vs. Assistant Commissioner, Special Circle (Produce), Mattancherry and another (95 STC 205)***. In this case, this Court held that;

> "When amount was due to him by way of refund, and it was available unappropriate with the 1st respondent, the petitioner as the person owed tax to the State was entitled to direct his creditor, the 1st respondent to appropriate it towards the demand made for 1977-78. The principles of Sections 59 and 60 of the Indian Contract Act, 1872 are not anathema to the provisions of the KGST Act as was held by this Court in Vijaya Oil Mills Vs. State of Kerala (1980) 45 STC 463); 1979 KLT 250. The Supreme Court had in fact recongised the compelling equity of such adjustments and appropriations in the decision in NC Mukherjee & Co., Vs. Union of India (1967 (1) SCWR 246); (1968) 68 ITR 500 (SC) rendered by a Constitution Bench."

10. I cannot accept the justification in Ext.P11 that this court had in Ext.P12 judgment held that the refund if any is liable to be given only to the grower and not to an auctioneer, although that was one of the contentions. The original petition, which was disposed of by Ext.P12 judgment, was filed by an exporter claiming refund of tax. This court did not finally decide the issue as wrongly assumed by the respondents, but on the other hand, taking into account the disputed questions of fact that were raised in that case, the parties were relegated to pursue their remedy before the Civil Court. It has been made

clear that the civil court shall decide the contentions untrammelled by the observations in the judgment. The judgment is not an authority for the proposition that the petitioner cannot claim refund of the excess amount it had remitted. On the other hand, being the dealer who remitted the excess tax, the final assessment order itself makes it clear that it is the petitioner who is entitled to have the amount refunded. That apart, even if any amount is liable to be refunded to the grower, it is a matter between the dealer and the grower and the state will have no justification in denying even adjustment on that basis. Apart from all these, Ext.P5 is a final assessment order, produced by the petitioner which discloses that adjustment as sought by the petitioner has been granted in respect of a similarly situated assessee. The respondents who have not filed a counter affidavit controverting any of the contentions in this original petition, have not explained as to why a discriminatory treatment has been adopted in the petitioner's case.

11. Thus, I see no reason why the petitioner should have been saddled with the liability of penal interest and in my view, it was the failure of the 2nd respondent in discharging his statutory duties that made the petitioner to seek adjustment of the amount due to it towards its future tax liability. For this the petitioner cannot be faulted especially when it had proved its bonafides by remitting the entire tax, soon after it was called upon to do so.

For the aforesaid reasons, I cannot sustain Exts.P8 and P11 and they are accordingly quashed and the original petition will stand allowed in the above terms. No costs.

ANTONY DOMINIC, JUDGE.

Rp